

1 Mayfield & Associates - Attorneys at Law
 2 Gayle Mayfield-Venieris, Esq., Bar No. 149296
 3 mayfield@mayfield-law.com
 4 Melissa L. Bustarde, Esq., Bar. No. 239062
 5 bustarde@mayfield-law.com
 6 Christopher Y. Lock, Esq., Bar. No. 246815
 7 lock@mayfield-law.com
 8 462 Stevens Avenue, Suite 303
 9 Solana Beach, CA 92075-2066
 10 Tel: (858) 793-8090; Fax: (858) 793-8099

11 Attorneys for: Material Witnesses ALVARO DELRIO-GARCIA, FIDEL LOPEZ-PAYAN,
 12 JORGE LOPEZ-TISCARENO

13 **UNITED STATES DISTRICT COURT**

14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 RENE GONZALEZ-LANDEROS (1),

19 GERARDO CORTEZ-COPADO (2),

20 Defendants.

21 Criminal Case No. 08 cr 2528-JLS
 22 Mag. Docket No. 08 mj 20263

23 **NOTICE OF MOTION AND MOTION
 24 FOR VIDEO DEPOSITION AND
 25 RELEASE OF MATERIAL WITNESSES
 26 ALVARO DELRIO-GARCIA, FIDEL
 27 LOPEZ-PAYAN, AND JORGE LOPEZ-
 28 TISCARENO**

29 JUDGE: Hon. Barbara L. Major
 30 CRTRM: Courtroom 5, Third Floor

31 DATE: August 18, 2008

32 TIME: 8:30 a.m.

33 TO KAREN P. HEWITT, UNITED STATES ATTORNEY, ALESSANDRA SERANO,
 34 ASSISTANT UNITED STATES ATTORNEY, SHAFFY MOEEL, ESQ., COUNSEL FOR
 35 DEFENDANT RENE GONZALEZ-LANDEROS, AND DAVID L. BAKER, ESQ., COUNSEL
 36 FOR DEFENDANT GERARDO CORTEZ-COPADO.

37 **PLEASE TAKE NOTICE** that on **August 18, 2008**, at **8:30 a.m.**, Gayle Mayfield-
 38 Venieris, Esq., counsel for the material witnesses ALVARO DELRIO-GARCIA (“**DELRIO**”),
 39 FIDEL LOPEZ-PAYAN (“**LOPEZ**”), JORGE LOPEZ-TISCARENO (“**JORGE**”) will move
 40

1 this Court for an order to take the video deposition of the material witnesses, and for their
2 immediate release.

3 **MOTION**

4 Material witnesses DELRIO, LOPEZ, and JORGE, through their counsel, Gayle
5 Mayfield-Venieris, and pursuant to Federal Rules of Criminal Procedure, Rule 15, 18 U.S.C. §§
6 3142 and 3144, hereby move this Court for an order to take their deposition by videotape and
7 release them at the conclusion of the deposition.

8 This Motion is based on this Notice and the Memorandum of Points and Authorities
9 attached and filed herewith, the records of the above-entitled case, and all matters submitted to
10 the Court prior to the determination of this Motion.

11

12 Dated: August 6, 2008

Mayfield & Associates

13

14 By: /s/ Gayle Mayfield-Venieris
15 Gayle Mayfield-Venieris, Esq.
16 Attorney for Material Witnesses
17 ALVARO DELRIO-GARCIA, FIDEL
18 LOPEZ-PAYAN, JORGE LOPEZ-
19 TISCARENO

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Mayfield & Associates - Attorneys at Law
Gayle Mayfield-Venieris, Esq., Bar No. 149296
mayfield@mayfield-law.com
Melissa L. Bustarde, Esq., Bar. No. 239062
bustarde@mayfield-law.com
Christopher Y. Lock, Esq., Bar. No. 246815
lock@mayfield-law.com
462 Stevens Avenue, Suite 303
Solana Beach, CA 92075-2066
Tel: (858) 793-8090; Fax: (858) 793-8099

Attorneys for: Material Witnesses ALVARO DELRIO-GARCIA, FIDEL LOPEZ-PAYAN,
JORGE LOPEZ-TISCARENO

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.
RENE GONZALEZ-LANDEROS (1),
GERARDO CORTEZ-COPADO (2).

Defendants.

Criminal Case No. 08 cr 2528-JLS
Mag. Docket No. 08 mj 2026

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR VIDEO DEPOSITION
AND RELEASE OF MATERIAL
WITNESSES ALVARO DELRIO-
GARCIA, FIDEL LOPEZ-PAYAN, AND
JORGE LOPEZ-TISCARENO**

JUDGE: Hon. Barbara L. Major
CRTRM: Courtroom 5, Third Floor

DATE: August 18, 2008

TIME: 8:30 a.m.

Material witnesses ALVARO DELRIO-GARCIA (“**DELRIO**”), FIDEL LOPEZ-PAYAN (“**LOPEZ**”), JORGE LOPEZ-TISCARENO (“**JORGE**”) by and through their designated counsel, GAYLE MAYFIELD-VENIERIS, submit the following Memorandum of Points and Authorities in support of their Motion for Videotape Deposition and Release at the conclusion thereof.

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I.

STATEMENT OF FACTS

3 Material witnesses ALVARO DELRIO-GARCIA (“**DELRIO**”), FIDEL LOPEZ-
4 PAYAN (“**LOPEZ**”), JORGE LOPEZ-TISCARENO (“**JORGE**”) were apprehended on July 1,
5 2008, in Campo, CA by United States Border Patrol. Defendants, GERARDO CORTEZ-
6 COPADO and RENE GONZALEZ-LANDEROS are charged with bringing in illegal aliens for
7 financial gain in violation of Title 8, United States Code, Section 1324 (a)(2)(B)(ii) and bringing
8 in illegal aliens without presentation in violation of Title 8, United States Code, Section 1324
9 (a)(2)(B)(iii). Material witnesses DELRIO, LOPEZ, and JORGE remain in custody and have no
10 prospects for securing release on bond.

II.

SUMMARY OF ARGUMENT

No material witness may be held in custody merely because he cannot provide surety for a bond. Once the material witness moves to take his own videotape deposition, the court must order a video deposition unless the opposing party meets its burden to show video deposition and release of the material witness would result in a failure of justice. While the defendant has made no showing of a failure of justice, DELRIO, LOPEZ, and JORGE have been unable to secure bond during the four weeks they have been in custody. Thus, given the defendants' inability to show a failure of justice, the material witnesses must be immediately deposed and released.

III.

POINTS AND AUTHORITIES

A. *Deposition is Mandated by Statute*

1) **18 U.S.C.S. § 3144**

Congress specifically enacted a statute to deal with the issue presented in this case, i.e., material witnesses who remain incarcerated owing solely to their inability to secure bond. In unmistakably plain language, Congress outlawed prolonged incarceration of such persons without substantial justification. “No material witness may be detained because of inability to

1 comply with any condition of release if the testimony of such witness can be secured by
 2 deposition, and if further detention is not necessary to prevent a failure of justice.” 18 U.S.C
 3 § 3144. “Upon such a showing, the district court must order [the witness’] deposition and
 4 prompt release.” *Torres-Ruiz v. United States District Court for the Southern District of*
 5 *California*, 120 F.3d 933, 935 (9th Cir. 1997) (*quoting Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413
 6 (5th Cir. 1992)) (emphasis in original).

7 **2) Federal Rule of Criminal Procedure 15**

8 Federal Rules of Criminal Procedure, Rule 15(a)(2), provides that

9 A witness who is detained under 18 U.S.C. § 3144 may request to be
 10 deposed by filing a written motion and giving notice to the parties. The court
 11 may then order that the deposition be taken and may discharge the witness after
 12 the witness signs under oath the deposition transcript.

13 Under such circumstances, “[i]f the deposition would prove admissible over any
 14 objection under the Confrontation Clause of the United States Constitution or the Federal Rules
 15 of Evidence, then the material [witness] must be deposed rather than detained.” *Aguilar-Ayala*,
 16 973 F.2d at 413 (emphasis added).

17 Prolonged incarceration of DELRIO, LOPEZ, and JORGE solely because of their
 18 inability to secure bond thus violates the clearly stated intent of Congress and straightforward
 19 rulings by the Court of Appeals prohibiting such practices. “[I]t is clear from a conjunctive
 20 reading [of Rule 15(a)] with [Section] 3144 that the discretion to deny the motion is limited to
 21 those instances in which the deposition would not serve as an adequate substitute for the witness’
 22 live testimony: that a failure of justice would ensue were the witness released. Absent a failure
 23 of justice, the witness must be released.” *Torres-Ruiz*, 120 F.3d at 935 (*citing Aguilar-Ayala*, at
 24 413 (internal citations and quotations omitted).

25 **3) Defendant Has Not Met His Burden to Defeat the Motion for Video**
 26 **Deposition**

27 To defeat a motion for video deposition of a material witness, the burden is on the
 28 opposing party to show admission of deposition testimony will result in a “failure of justice.” 18
 4 of 11

1 U.S.C.S. § 3144; *Torres-Ruiz*, at 935. To meet this burden, the defendant must make a plausible
 2 showing the witness' testimony would be both material and favorable to his defense. *See United*
 3 *States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

4 In *Valenzuela-Bernal*, the defendant was charged with transporting an illegal alien.
 5 *Valenzuela-Bernal*, 458 U.S. at 860. The Government detained the illegal alien as a material
 6 witness (Witness No. 1) but deported two other witnesses (Witnesses Nos. 2 and 3) (also illegal
 7 aliens) before defendant was able to interview them. *Id.* at 861. Defendant appealed, claiming
 8 deportation of Witnesses Nos. 2 and 3 deprived him of the opportunity to determine whether
 9 their testimony would aid his defense. *Id.* According to the Supreme Court, even though the
 10 defendant knew what Witnesses 2 and 3 might have said to him to indicate whether Witness No.
 11 1 had legal status to be present in this country, the defendant failed to show how the deported
 12 witnesses' testimony would have been helpful to his defense. *Id.* at 874.

13 [I]t should be remembered that [defendant] was present throughout
 14 the commission of this crime. No one knows better than he what
 15 the deported witnesses actually said to him, or in his presence, that
 16 might bear upon whether he knew that [Witness No. 1] was an
 17 illegal alien who had entered the country within the past three
 18 years. And, in light of the actual charge made in the indictment, it
 19 was only the status of [Witness No. 1] which was relevant to the
 20 defense. [Witness No. 1], of course, remained fully available for
 21 examination by the defendant and his attorney. We thus conclude
 22 that the [defendant] can establish no Sixth Amendment violation
 23 without making some plausible explanation of the assistance he
 24 would have received from the testimony of the deported witnesses.

25 *Valenzuela-Bernal*, 458 U.S. at 871.

26 The Supreme Court's reasoning applies with even greater force in this case. In
 27 *Valenzuela-Bernal*, the witnesses were deported before the defendant had the opportunity to
 28 interview them. Here, the defendants have had the opportunity to interview the material
 29 witnesses while they have been incarcerated for the past four weeks. Despite this opportunity,
 30 the defendants have produced no evidence, nor have the defendants made any showing the
 31 witnesses have material information helpful to the defense. In short, the defendants have made
 32 no showing of a failure of justice. Consequently, the material witnesses must be deposed and
 33 released.

1 ***B. A Material Witness Does Not Have to Show Exceptional Circumstances To***
 2 ***Request A Videotape Deposition.***

3 The plain language of Federal Rules of Criminal Procedure, Rule 15(a)(2) demonstrates
 4 that a material witness who files a motion for his own deposition is not required to demonstrate
 5 exceptional circumstances. Where a material witness moves for a Rule 15 deposition, he need
 6 not show such “exceptional circumstances.” *United States v. Chen*, 214 F.R.D. 578, 579 (N.D.
 7 Cal. 2003); *see also, Aguilar-Ayala v. Ruiz*, 973 F.2d at 420 (5th Cir. 1992) (ff. 6); *United States*
 8 *v. Allie*, 978 F.2d 1401, 1404 (5th Cir. 1992).

9 “Witnesses detained under § 3144 are explicitly excepted from demonstrating exceptional
 10 circumstances to effectuate their own deposition.” *Aguilar-Ayala v. Ruiz*, 973 F.2d at 420 (5th
 11 Cir. 1992) (ff. 6)(emphasis added); *see also, United States v. Allie*, 978 F.2d 1401, 1404 (5th Cir.
 12 1992). Indeed, Rule 15(a)(2), which addresses the process for a detained material witness to
 13 seek a deposition, does not even mention exceptional circumstances.

14 The confusion regarding the requirement of exceptional circumstances was clarified in
 15 2002 when Congress amended Rule 15(a) to distinguish motions brought by material witnesses
 16 for depositions from motions brought by other parties, *United States v. Chen*, 214 F.R.D. at 580
 17 (ff. 2), thus implying that motions for a deposition brought by a material witness does not require
 18 a showing of exceptional circumstances. “Before the amendment, it was unclear whether the
 19 ‘exceptional circumstances’ standard applied when a material witness moved for a deposition.
 20 The amendment makes clear that this heightened standard only applies to a motion made by a
 21 *party*.” *United States v. Chen*, 214 F.R.D. at 580 (ff. 2)(emphasis in original). Only Rule
 22 15(a)(1), which addresses where a party seeks a deposition of a prospective witness, addresses
 23 the exceptional circumstances requirement. Thus, it is only where parties other than the detained
 24 material witness file a motion for the witness’ deposition that a showing of exceptional
 25 circumstances is required. *See, Fed. Rule Crim. Pro., Rule 15(a)(1); see also, Chen*, 214 F.R.D.
 26 at 579; *Allie*, 978 F.2d at 1404.

27 Therefore, material witnesses DELRIO, LOPEZ, and JORGE do not have to make a
 28 showing of exceptional circumstances.

C. *Deposition Preserves Defendants' Rights*

1) Deposition Preserves Defendant's Sixth Amendment Right to Confrontation

Under ideal circumstances, the material witness would be deposed and released and would subsequently return for the defendant's trial. The Office of the United States Attorney in fact employs well-established procedures to ensure such a result. Prior to release, the Government is required to serve each material witness with a subpoena for the trial date and a travel fund advance letter. Thus, under ideal circumstances, each material witness would return for trial and questions about preserving defendants' right to confront and cross-examine the material witness would be moot.

11 Even if the material witnesses do not return for trial, their deposition will be admissible in
12 lieu of live testimony. *See Rivera*, at 1207. Admission of prior-recorded testimony by a witness
13 who is unavailable for trial has in fact been upheld for more than a century. In 1895, the
14 Supreme Court held admission of testimony given at a defendant's first trial by a witness who
15 died before the second trial did not violate the confrontation clause. *Mattox v. United States*, 156
16 U.S. 237 (1895). Since that time, courts have consistently upheld the principle that prior-
17 recorded testimony later admitted at trial does not violate a defendant's Sixth Amendment
18 confrontation rights so long as: (1) there is some exceptional circumstance where, in the interests
19 of justice, it is necessary to take and preserve testimony outside the court; (2) the prior testimony
20 was given at a hearing, proceeding or deposition; (3) an authorized person put the witness under
21 oath; (4) the defendant had the right to be present; (5) the defendant was represented by counsel
22 who was given a complete and adequate opportunity to cross-examine the witness; and (6) the
23 witness meets the criteria for unavailability. *See Fed. R. Civ. P. 28 and 30; Fed. R. Evid. 804(a);*
24 *see also California v. Green*, 399 U.S. 149, 165-166 (1970); *Torres-Ruiz* at 933; *Aguilar-Ayala*
25 at 413.

26 As shown above, this case, the interests of justice mandate taking and preserving the
27 material witnesses' testimony outside the court, i.e., by video deposition. The defendants' rights
28 under the Sixth Amendment are preserved by the statutory requirements for a deposition,

1 including the presence of a person authorized to put the witness under oath, the defendant's right
2 to be present, the defendant's right to be represented by counsel, and the defendant's right to
3 completely and adequately cross-examine the witness. *See Fed. R. Civ. P. 28 and 30.* Moreover,
4 these procedural requirements provide a sufficient indicia of reliability to "[a]fford the trier of
5 fact a satisfactory basis for evaluating the truth of the prior statement," further protecting
6 defendant's rights under the confrontation clause. *California v. Green*, 399 U.S. at 161.

7 Finally, if a material witness fails to return for trial, the deposition will be admissible, as
8 the material witness would meet the requirements for unavailability. In the context of this case,
9 an unavailable witness is one who is out of the United States, providing the absence of the
10 witness was not procured by the party offering the deposition, or a witness whose attendance
11 cannot be procured by subpoena. *See Fed. R. Crim. P. 15; Fed. R. Evid. 804(a).* Where a
12 material witness has left the United States voluntarily or even by forced deportation, the witness'
13 later absence from trial does not violate the defendant's rights under the confrontation clause
14 provided the Government makes a reasonable effort to assure the witness' attendance at trial.
15 *Aguilar-Ayala*, at 418 (*quoting Ohio v. Roberts*, 448 U.S. 56, 65 (1980)); *see also Rivera*, at
16 1207.

17 In *U.S. v. Eufracio-Torres*, before the material witnesses were forcibly deported, the
18 Government, using procedures similar to those presently employed in the Southern District of
19 California, served them with trial subpoenas and instructed them on how to return for trial and
20 obtain the necessary travel funds. *U.S. v. Eufracio-Torres*, 890 F. 2d 266, 270 (1989). Although
21 the witnesses did not appear for trial, the Court of Appeals held their deposition testimony was
22 admissible under such circumstances, where the Government used "good faith" and "reasonable
23 means" to assure that the witnesses would attend trial. *U.S. v. Eufracio-Torres*, 890 F. 2d at 271.
24 "So long as the government has employed reasonable measures to secure the witness' presence at
25 trial, the fact that the witness has nevertheless failed to appear will not preclude the admission of
26 deposition testimony. Such a witness will be deemed 'unavailable' and the deposition is
27 admissible over the defendant's Confrontation Clause and hearsay objections." *Aguilar-Ayala*,
28 at 418 (*quoting Ohio v. Roberts*, 448 U.S. at 65); *see also Fed. R. Evid. 804(a).*

1 Thus, even if the United States Attorney's reasonable and well-established procedures
 2 fail to obtain the material witnesses' attendance at trial, statutory procedures for the taking of the
 3 deposition preserves defendants' Sixth Amendment confrontation rights, and the deposition will
 4 be admissible at trial.

5 2) **Deposition Preserves Defendant's Sixth Amendment Right to**
 6 **Compulsory Process**

7 "The only recent decision of this Court dealing with the right to compulsory process
 8 guaranteed by the Sixth Amendment suggests that more than the mere absence of testimony is
 9 necessary to establish a violation of the right." *See Valenzuela-Bernal*, at 867 (witnesses
 10 deported before interviewed by defendant). "Indeed, the Sixth Amendment does not by its terms
 11 grant to a criminal defendant the right to secure the attendance and testimony of any and all
 12 witnesses: it guarantees him 'compulsory process for obtaining witnesses in his favor.'"
 13 *Valenzuela-Bernal*, at 867, (quoting U.S. Const., Amdt. 6). "[D]efendant cannot establish a
 14 violation of his constitutional right to compulsory process merely by showing that deportation of
 15 the [witness] deprived him of [his] testimony. He must at least make some plausible showing of
 16 how [his] testimony would have been both material and favorable to his defense." *See*
 17 *Valenzuela-Bernal*, at 867 (emphasis added); *see also* Fed. R. Crim. P. 17(b) (requiring
 18 Government to subpoena witnesses on behalf of indigent defendants "upon a satisfactory
 19 showing . . . that the presence of the witness is necessary to an adequate defense.").

20 In this case, material witnesses DELRIO, LOPEZ, and JORGE have been in custody
 21 since July 1, 2008. Since that time, the material witnesses have been available for interview by
 22 both defense counsels and the Assistant United States Attorney, who thus have had an ample
 23 opportunity to ascertain the substance of any testimony the material witnesses might provide at
 24 trial. Because the material witnesses' testimony can be adequately preserved by video deposition
 25 and they are subject to the subpoena power of this Court, further detention is not necessary to
 26 prevent a failure of justice.

27 Moreover, a guarantee from the Government that the material witness will return for trial
 28 is not a prerequisite for an order for video deposition. The Government is required only to use
 9 of 11

1 reasonable means to insure the appearance of the material witness. *See Aguilar-Ayala*, at 418.
 2 “We gather from these cases that deposition testimony is admissible only if the government has
 3 exhausted reasonable efforts to assure that the witness will attend trial. The ultimate success or
 4 failure of those efforts is not dispositive. So long as the government has employed reasonable
 5 measures to secure the witness’ presence at trial, the fact that the witness has nevertheless failed
 6 to appear will not preclude the admission of deposition testimony. Such a witness will be
 7 deemed ‘unavailable.’” *Aguilar-Ayala*, at 418 (*citing Ohio v. Roberts*, at 65). Because the
 8 material witnesses’ testimony can be adequately preserved by video deposition and they are
 9 subject to the subpoena power of this Court, the defendants’ rights to compulsory process are
 10 protected and the Court must order the deposition and release of the material witnesses.

11 **3) Deposition Preserves Defendant’s Fifth Amendment Right to Due**
 12 **Process**

13 “Due process guarantees that a criminal defendant will be treated with ‘that fundamental
 14 fairness essential to the very concept of justice. In order to declare a denial of it we must find
 15 that the absence of that fairness fatally infected the trial; the acts complained of must be of such
 16 quality as necessarily prevents a fair trial.’” *Valenzuela-Bernal*, at 872, (*quoting Lisenba v.*
 17 *California*, 314 U.S. 219, 236 (1941)). In another context, the Supreme Court held that instances
 18 where the Government withholds evidence required by statute to be disclosed constitute due
 19 process violations only when they “so infect the fairness of the trial as to make it ‘more a
 20 spectacle or trial by ordeal than disciplined contest.’” *Valenzuela-Bernal*, at 872, (*quoting*
 21 *United States v. Augenblick*, 393 U.S. 348, 356 (1969)) (citations omitted). For there to be a due
 22 process violation by release of the material witnesses in this case, the defendant must provide
 23 “some explanation of how their testimony would have been favorable and material.” *Id.*

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1 **IV.**2 **CONCLUSION**3 Based on the discussion above, material witnesses DELRIO, LOPEZ, and JORGE
4 respectfully move the Court for an order requiring their video deposition to be taken as soon as
5 possible, and for their immediate release from custody upon conclusion of the deposition.6
7 Dated: August 6, 2008

Mayfield & Associates

8
9 By: /s/ Gayle Mayfield-Venieris
10 Gayle Mayfield-Venieris, Esq.
11 Attorney for Material Witnesses
12 ALVARO DELRIO-GARCIA, FIDEL
13 LOPEZ-PAYAN, JORGE LOPEZ-
14 TISCARENO
15 federal@mayfield-law.com16
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18
19
20
21
22
23
24
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27
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Mayfield & Associates - Attorneys at Law
Gayle Mayfield-Venieris, Esq., Bar No. 149296
mayfield@mayfield-law.com
Melissa L. Bustarde, Esq., Bar. No. 239062
bustarde@mayfield-law.com
Christopher Y. Lock, Esq., Bar. No. 246815
lock@mayfield-law.com
462 Stevens Avenue, Suite 303
Solana Beach, CA 92075-2066
Tel: (858) 793-8090; Fax: (858) 793-8099

Attorneys for: Material Witnesses ALVARO DELRIO-GARCIA, FIDEL LOPEZ-PAYAN, JORGE LOPEZ-TISCARENO

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,
Plaintiff

Criminal Case No. 08 cr 2528-JLS
Mag. Docket No. 08 mj 2026

v.
RENE GONZALEZ-LANDEROS (1),
GERARDO CORTEZ-COPADO (2),

**PROOF OF SERVICE VIA E-FILE
[Fed. R. Civ. Pro. 4, Local Rule 5]**

Defendants.

J. Melissa L. Bustarde, Esq., declare as follows:

1. I am over eighteen years of age and not a party to the above-referenced action; my business address is 462 Stevens Avenue, Suite 303, Solana Beach, CA 92075-2066. I am employed in San Diego County, California.

2. On August 6, 2008, I filed the following document on the Court's CM/ECF system in Case No. 08 mj 2026/08 cr 2528-JLS. The following counsel were electronically served with the following documents via the CM/ECF system pursuant to Local Rule 5.4(c):

111

- 1 • **Motion to Shorten Time**
- 2 • **Notice of Motion and Motion to take Deposition by Video**
- 3 • **Points and Authorities in Support of Motion for Video Deposition**

4 Alessandra Serano, A.U.S.A

Shaffy Moeel, Esq.

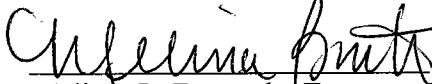
5 Efile.dkt.gc2@usdoj.gov

shaffy_moeel@fd.org

6 David L. Baker, Esq.

7 dlbakerlaw@aol.com

8 I declare under penalty of perjury under the laws of the United States, State of California
9 that the foregoing is true and correct and that this declaration was executed on August 6, 2008.

10 
11 Melissa L. Bustarde, Esq.
12 Mayfield & Associates